IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
APPELLATE CIVIL JURISDICTION

CIVIL WRIT PETITION NO.846 OF 2007

Sanjay Nivrutti Tawade ...Petitioner (J.D.)
Vs.
Jaihind Motor Garage & Anr. ...Respondents(D.H.)

Mr. V.Z. Kankaria, Advocate for Petitioner
Mr. U.B.Nighot, Advocate for Respondents

CORAM: SHRI ABHAY S. OKA, J.
DATED: 30TH APRIL, 2007

ORAL JUDGMENT

1. Heard learned Advocates appearing for the Petitioner and the first Respondent. Considering the facts and circumstances of the case, the Writ Petition is taken up for final disposal at the stage of admission. The second Respondent is the Judgment Debtor and hence, notice to the second Respondent is not necessary.

2. Challenge in this Writ Petition under Article 227 of the Constitution of India is to the order dated 22nd November, 2006 passed below Exhibit-26 in execution application filed by the first Respondent.

3. In execution of money decree obtained by the first Respondent, an application was made by the first Respondent praying for issuing jail warrant as required by Rule 38 of Order XXI of the Code of Civil Procedure, 1908, as the Petitioner was

not complying with the money decree. By the impugned order, the said application has been allowed and a warrant of arrest has been ordered to be issued against the Petitioner.

4. The learned Advocate for the Petitioner has placed reliance on the decision of the Apex Court in the case of Jolly George Varghese Vs. The Bank of Cochin (AIR 1980 Supreme Court, 470). He also placed reliance on the decision of learned Single Judge of this Court in the case of Pundalik Mahadu Nazire Vs. Maharashtra State Farming Corporation (1992 Vol-1, Mh.L.J.455). He submitted that in view of the law laid down in the aforesaid decisions, the impugned order is required to be quashed and set aside. The learned Advocate for the first Respfondent supported the impugned judgment and order.

5. I have considered the submissions. The learned Single Judge in the case of Pundalik has held thus :

> " In my opinion, the impugned order cannot stand in law as it suffers from serious infirmities. The first infirmity is the non application of mind by the Court to the facts and circumstances of the case. The proviso to Section 51 so far it is relevant here lays down that where the decree is for payment of money, execution by detention in prison shall not be ordered unless the Court is satisfied that the judgment-debtor, has or has had since the date of the decree the means to pay the amount of decree or some substantial part thereof and refuses or neglects or has referred or neglected to pay the same. The respondent has alleged in the application (Exh.35) that the

petitioner is a tenant in respect of the land at Achalegaon because

his name appears in the record of rights of the year 1982. There is, however, absolutely no material to show that except the provident fund which he had, the petitioner has or has had any means to pay. There is also no evidence to show that he derives any income from the said land. In the circumstances, it is not possible to infer that the petitioner either refuses or has refused or neglected to pay the decretal amount. In case of *Jolly George Verghese Vs. Bank of Kochin, AIR 1980 SC 470*, it has been laid down that when the judgment-debtor if once had the means to pay the debt but subsequently after the date of decree, has no such means or he has Money on which there are other pressing claims, and no dishonesty or bad faith intervenes, the judgment-debtor cannot be confined in jail for non-fulfillment of his decretal obligation by coercive method which is violative of Article 21 of the Constitution of India. The proviso to section 51 emphasizes the need to establish not mere omission to pay but an attitude of refusal on demand intervening dishonest disowning of the obligation under the decree. The learned Judge of the executing Court, therefore, has failed to satisfy aforesaid requirement before passing the impugned order."

6. Perusal of impugned order shows that there is no specific finding recorded by the executing Court that the requirements of law as reflected in the aforesaid decisions are satisfied. The law is that it is not sufficient to establish mere omission to pay, but what is required to established is the attitude of refusal on demand and dishonest disowning of the obligation under the decree.

7. Only on the ground of non-consideration of the aforesaid aspects, the impugned order is required to be quashed and set aside, and the application will have to be heard afresh in the light

of law laid down by the Apex Court and this Court.

8. Hence, I pass following order :

(a) The impugned order dated 22nd November, 2006 is quashed and set aside.

(b) The application at exhibit-26 in Regular Darkhast No.268 of 2006 is restored to the file.

(c) The learned trial Judge shall decide the said application afresh in the light of observations made in this order.

(d) The application shall be decided as expeditiously as possible and preferably on or before 22nd July, 2007.

(e) All parties to act on the authenticated copy of this order.

JUDGE